Jupiter Capital Sdn Bhd v Tan Lay Hong & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D6–22–122 OF 1999
HAMID SULTAN J
26 NOVEMBER 2010

Civil Procedure — Limitation — Claim based on contract — Whether claim statute barred — Amendment to include second and third defendants as parties allowed notwithstanding expiry of limitation period — Whether second and third defendants could raise defence of limitation at trial — Whether limitation issue pleaded — Whether cause of action against second and third defendants dated back to date of original writ or to date they were made parties — Limitation Act 1950 s 6

Moneylenders — Loan — Provision of share margin facility — Exemption under s 2A(2) of the Moneylenders Act 1951 — Whether Minister empowered to provide blanket exemption for share financing — Whether license required under Banking and Financial Institutions Act 1989

The plaintiff was a moneylender and was issued an exemption under s 2A(2) of the Moneylenders Act 1951 ('MLA'), inter alia, to do share financing. Sometime in 1997 the plaintiff entered into an agreement with the first defendant wherein the first defendant was provided a share margin facility for the sum of RM3.8m. The first defendant defaulted and the plaintiff issued the writ in 1998. Subsequently, the plaintiff in 2005 amended the writ and statement of claim to include the second and third defendants on the grounds that they were the principals to the first defendant and were therefore liable for the sum owing by the first defendant. The second and third defendants in their defence pleaded the defence of limitation. The second and third defendants also questioned whether the Minister was empowered to provide a blanket exemption for share financing where such facilities bordered on provisions of financing, giving of a credit facility and banking within the Banking and Financial Institutions Act 1989 ('BAFIA') which required a license. They claimed that the plaintiff failed to prove that the plaintiff was licensed under BAFIA. The following issues had to be determined pursuant to O33 r 1 of the Rules of the High Court 1980: (i) whether the plaintiff's claim against the second and third defendants was defeated by the statute of limitation; and (ii) whether the plaintiff's claim against all the defendants was defeated by the following provisions: (a) Moneylenders Act 1951; (b) Securities Industries Act; (c) BAFIA; and (d) Bursa Regulations.

Held, dismissing the claim against the second and third defendants:

(1) In relation to the amendment of the writ and the statement of claim, the

threshold requirement for the plaintiff to satisfy was very low. It did not mean that if the amendment was allowed notwithstanding the second and third defendants had failed in their objection, the second and third defendants cannot plead in their defence the defence of limitation and succeed at the trial (see para 8(a)).

(2) It is trite that the defence of limitation must be pleaded for the defendant to get the protection of the substantive law. This could only happen after the amendment had been allowed. The second and third defendants had pleaded the defence of limitation and on the undisputed facts ought to succeed (see para 8(b)).

(3) The cause of action against the second and third defendants did not date back to the date of the original writ and statement of claim ie on 14 January 1999 but was from the date the second and third defendants were added as parties to the suit. As such, the cause of action against the second and third defendants was statute barred based on s 6 of the Limitation Act 1950 as the primary cause of action relied upon by the plaintiff against the defendants was for breach of the facility agreement and agency (see para 8).

(4) The plaintiff's claim against the first defendant was not defeated by the following statutory provisions namely: (i) Money Lending Act 1951; (ii) Securities Industries Act; (iii) BAFIA; and (iv) Bursa Regulations (see para 9).

[Bahasa Malaysia summary

Plaintif merupakan pemberi pinjaman wang dan telah mengeluarkan pengecualian di bawah s 2A(2) Akta Pemberipinjam Wang 1951 ('APW'), antara lain, untuk menjalankan pembiayaan perkongsian. Sekitar tahun 1997, plaintif telah menandatangani perjanjian dengan defendan pertama di mana defendan pertama telah memberikan kemudahan margin syer untuk jumlah RM3.8 juta. Defendan pertama telah ingkar dan plaintif telah mengeluarkan writ pada tahun 1998. Selanjutnya, pada tahun 2005, plaintif telah meminda writ dan pernyataan tuntutan dengan memasukkan defendan kedua dan ketiga atas alasan bahawa mereka merupakan prinsipal kepada defendan pertama dan oleh itu adalah bertanggungan untuk jumlah yang perlu dibayar oleh defendan pertama. Defendan kedua dan ketiga dalam pembelaan mereka memplid pembelaan had masa. Defendan kedua dan ketiga juga menyoal sama ada Menteri mempunyai kuasa untuk memberikan pengecualian menyeluruh untuk kemudahan syer di mana kemudahan-kemudahan tersebut berbataskan kepada peruntukan-peruntukan kemudahan, pemberian kemudahan pinjaman dan perbankan di dalam Akta Bank dan Institusi-Institusi Kewangan 1989 ('ABIK') yang mana memerlukan lesen. Mereka mendakwa bahawa plaintif gagal untuk membuktikan bahawa plaintif mempunyai lesen di bawah ABIK. Isu-isu berikut hendaklah ditentukan mengikut A 33 k 1

Kaedah-Kaedah Mahkamah Tinggi 1980: (i) sama ada tuntutan plaintif terhadap defendan kedua dan ketiga telah digagalkan oleh had masa statutori; dan (ii) sama ada tuntutan plaintif terhadap kesemua defendan telah digagalkan oleh peruntukan-peruntukan berikut: (a) Akta Pemberipinjam Wang 1951; (b) Akta Perindustrian Sekuriti; (c) ABIK; dan (d) Peraturan-Peraturan Bursa.

Diputuskan, menolak tuntutan terhadap defendan kedua dan ketiga:

(1) Berkenaan dengan pindaan terhadap writ dan pernyataan tuntutan, keperluan standard yang harus dipenuhi oleh plaintif adalah sangat rendah. Ia tidak bermakna sekiranya pindaan tersebut dibenarkan meskipun defendan kedua dan ketiga telah gagal dalam bantahan mereka, defendan kedua dan ketiga tidak boleh memplid di dalam pembelaan had masa mereka dan berjaya semasa perbicaraan (lihat perenggan 8 (a)).

(2) Adalah tetap bahawa pembelaan had masa hendaklah diplid bagi defendan untuk mendapat perlindungan undang-undang substantif. Ini boleh dilakukan hanya selepas pindaan tersebut dibenarkan. Defendan kedua dan ketiga telah memplid pembelaan had masa dan seharusnya berjaya berdasarkan kepada fakta-fakta yang tidak boleh dipertikaikan (lihat perenggan 8(b)).

(3) Kausa tindakan terhadap defendan kedua dan ketiga tidak terkebelakang kepada tarikh asal writ dan pernyataan tuntutan iaitu pada 14 Januari 1999 tetapi adalah dari tarikh apabila defendan kedua dan ketiga telah dimasukkan sebagai pihak-pihak kepada guaman tersebut. Oleh itu, kausa tindakan terhadap defendan kedua dan ketiga adalah dihalang secara statutori bersandarkan kepada s 6 Akta Had Masa 1953 memandangkan kausa tindakan utama yang diguna pakai oleh plaintif terhadap defendan adalah untuk pelanggaran perjanjian kemudahan dan agensi (lihat perenggan 8).

(4) Tuntutan plaintif terhadap defendan pertama tidak digagalkan oleh peruntukan-peruntukan statutori berikut: (i) Akta Pemberipinjam Wang 1951; (ii) Akta Perindustrian Sekuriti; (iii) ABIK; dan (iv) Peraturan-Peraturan Bursa (lihat perenggan 9).]

Notes

For cases on limitation in general, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5148–5154.

For cases on loan in general, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 534–560.

Cases referred to

Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230, HC (distd)
Liff v Peasely [1980] 1 All ER 623, CA (refd)
AEH Capital Sdn Bhd v AM-EL Holdings Sdn Bhd & another appeal [2008] 4 MLJ 487, CA (refd)
Government of Malaysia v Mohamed Amin bin Hassan [1986] 1 MLJ 224, CA (refd)
Lucy v WT Henley's Telegraph Works Co Ltd [1969] 3 All ER 456, CA (refd)
Sio Koon Lin & Anor v SB Mehra [1981] 1 MLJ 225, FC (distd)
Weldon v Neal (1887) 19 QBD 394, CA (refd)

Legislation referred to

Banking and Financial Institutions Act 1989
Limitation Act 1953 s 6
Moneylenders Act 1951 s 2A(2)
Securities Industries Act 1983
Rules of the High Court 1980 O 33, O 33 r 1

MQ Ng (Shui-Tai) for the plaintiff.
SM Chan (Tan Chuan Yong & SM Chan) for the first defendant.
Muhammad Shafee Md Abdullah (Ngeow & Tan) for the second and third defendants.

Hamid Sultan J:

[1] This is my judgment in respect of the above suit as well as civil suits No D6–22–124 of 1999, D6–22–123 of 1999 and D6–22–396 of 1999 made pursuant to O 33 r 1 of the RHC 1980.

ISSUES

[2]

(a) Whether the plaintiff's claim against the second and third defendants will be defeated by the statute of limitation ('the first issue'); and

(b) whether the plaintiff's claim against all the defendants will be defeated by the following provisions:

(a) Moneylenders Act 1951 ('MLA');

(b) Securities Industries Act 1983;

(c) Banking and Financial Institutions Act 1989 (BAFIA);

(d) Bursa regulations ('second issue')

[3] The parties had agreed that the decision on the first issue will bind the second and third defendants in the other suits and the decision in the second issue will bind all parties in the other suits.

[4] The parties had also agreed that for purposes of the submission on the first and second issues, the parties shall rely on the following:

(a) pleadings;

(b) gazetted notification of the money lenders license and exemptions issued under the MLA;

(c) all documents in the bundle of documents where the authenticity of the same are not disputed;

(d) margin facility agreement; and

(e) the plaintiff's first letter of demand.

BRIEF FACTS

[5] The plaintiff is a moneylender and was issued an exemption under s 2A(2) of the Moneylenders Act 1951 (MLA), inter alia, to do share financing. Sometime in 1997 the plaintiff entered into an agreement with the first defendant wherein the first defendant was provided a share margin facility for the sum of RM 3.8 million. The first defendant defaulted and the plaintiff issued the writ in 1998. Subsequently, the plaintiff in 2005 (nearly seven years after cause of action) amended the writ and statement of claim to include the second and third defendants on the grounds that they were the principals to the first defendant and was therefore liable for the sum owing by the first defendant. The second and third defendants in their defence have pleaded the defence of limitation.

[6] It is the plaintiff's contention that the cause of action against the second and third defendants accrues on the date of termination of the facility ie 22 May 1998 and the writ was issued on 1999 and the amendment to include was allowed, limitation does not arise and relies heavily on the case of *Sio Koon Lin & Anor v SB Mehra* [1981] 1 MLJ 225 (FC). The plaintiff also relies on the case of *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230where the court held that the court had power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment will be to add or substitute a new cause of action subject to a very important condition

namely that the new cause of action must arise out of the same or substantially the same facts of the cause of action in respect of which relief had already been claimed.

[7] In respect of the second issue, the plaintiff says the exemption granted by the Minister was valid and not ultra vires and relies heavily on the case of *AEH Capital Sdn Bhd v AM-EL Holdings Sdn Bhd & another appeal* [2008] 4 MLJ 487 where the majority judgment of the Court of Appeal where it was held:

> To conclude on this point, the Minister empowered to grant the exemption under s 2A(2) of the Act as the Minister of Housing and Local Government. The exemption under PU(B) 242/96 is valid and full legal effect. By reason of the exemption order PU(B) 242/96 issued, in respect of any loan given to AM-EL which is related to credit leasing/share financial, AEH was entitled to impose terms and conditions inconsistent with the provision of the Act.

On this issue, learned counsel for the second and third defendants says the real question is whether the Minister was empowered to provide a blanket exemption for share financing where such facilities border on provisions of financing, giving of a credit facility and banking within the Banking and Financial Institutions Act 1989(BAFIA) which require a license. The relevant BAFIA Act at the material time is Act 372 as at 1 January 1998 and the plaintiff has failed to prove that the plaintiff is licensed under BAFIA.

[8] I have read the documents and submissions of the parties in detail. I take the view that the plaintiff's claim against the second and third defendants will be defeated by the Limitation Act 1953. My reasons, inter alia, are as follows:

(a) in dealing with the issue of limitation, on the facts of this case the issues need to be considered into two parts. The first part is in relation to the amendment of the writ and the statement of claim. At this stage the threshold requirement for the plaintiff to satisfy according to case laws relating to amendment is very low. This is reflected in the cases the plaintiff has relied on. That does not mean that if the amendment is allowed notwithstanding the second and third defendants had failed in their objection the second and third defendants cannot plead in their defence the defence of limitation. And succeed, at the trial. Only at the trial stage can the defendant prove the defence of limitation, or where the facts have been agreed in the instant case at O 33 stage etc;

(b) It is trite that the defence of limitation must be pleaded for the defendant to get the protection of the substantive law. This can only happen after the second stage ie after the amendment has been allowed. In the instant case the second and third defendants have pleaded the defence of

limitation and on the undisputed facts ought to succeed. Support for the proposition is found in a number of cases.

(i) In the Federal Court case, *Government of Malaysia v Mohamed Amin bin Hassan* [1986] 1 MLJ 224 the plaintiff applied for an order to amend the statement of claim to add his wife as the second plaintiff after the expiry of limitation period. His Lordship Syed Agil Barakbah SCJ stated at p 227 para G:

> Paragraph (3) provides that an amendment to correct the name of a party may be allowed under para (2) notwithstanding that it is alleged that the effect of the amendment is to substitute a new party; but this power is explicitly confined to an amendment to correct the name where there is a genuine mistake which it is sought to correct. The addition of a new and different party is not correcting the name of a party; it is not a matter of mistake. The inference is inevitable that an amendment to add a completely new and different defendant is not permissible where a relevant period of limitation affecting the proposed defendant has expired.

His Lordship further added:

> Secondly, I do not think it is the intention of legislature to allow such amendment at that stage. It is not a technical defect because it introduces a new party to the action and leave to amend should have been applied for prior to the expiry of the statutory period of limitation.

(ii) In the case of *Weldon v Neal* (1887) 19 QBD 394 it was stated:

> We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of amendment, would be statute barred by Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, in general rule, would be, in my opinion, improper and unjust.

(iii) In *Liff v Peasely* [1980] 1 All ER 623, the court had to decide whether the plaintiff should be allowed to add Mr Spinks as a second defendant. In this case, the Mr Peasely (the first defendant) claimed that the collision was caused wholly or partly by the negligence of Mr Spinks. It was only after the expiry of the limitation period, the plaintiff managed to obtain leave to add Mr Spinks as the second defendant. Stephenson LJ at p 632 para (a) was confronted with two alternatives in deciding this matter:

(A) the action against the defendant relates back to the date of the original writ, depriving the defendant to rely on the statute of limitation; and

(B) the action against the added defendant is begun at the date of the amendment joining him, and so he can rely on the statute as barring the plaintiff from suing him.

(iv) In another Court of Appeal decision of *Lucy v WT Henley's Telegraph Works Co Ltd* [1969] 3 All ER 456, Megaw LJ observes as follows:

> I am unaware of any case in which leave to amend a writ has been given in such circumstances; namely, where the joinder of a new defendant would be calculated to defeat a right as to limitation which he would have had if an action were to be bought by the plaintiff against him alone.

I must say the facts of the cases which the plaintiff relied on can be distinguished. In the instant case two new defendants were added on when the cause of action against them has prima facie expired. In consequence the principles adumbrated by the cases cited by the second and third defendants become relevant. In consequence, I am inclined to accept the submission of learned counsel for the second and third defendants that the cause of action against the second and third defendants does not date back to the date of the original writ and statement of claim ie on 14 January 1999 but from the date the second and third defendants were added as parties to this suit. As such, the cause of action against the second and third defendants is statute barred based on s 6 of the Limitation Act 1950 as the primary cause of action relied upon by the plaintiff against the defendants is for breach of the facility agreement and agency.

[9] For reasons stated above, the claim against the second and third defendants must be dismissed. In respect of the second issue relating to statutory defences raised by the defendants, I have taken note that the first defendant did not comply with the courts' order and have failed to put a written submission on these issues. After having given much consideration to the submission of learned counsel for the plaintiff I agree with the plaintiff's claim against the first defendant (as the claim against second and third defendants has been dismissed) will not be defeated by the following statutory provisions namely:

(a) Moneylenders Act 1951 ('MLA');

(b) Securities Industries Act 1983;

(c) Banking and Financial Institutions Act 1989 (BAFIA); and;

(d) Bursa regulations.

[10] On the issue of costs I will hear the party and make the necessary orders.

Claim against second and third defendants dismissed.

Reported by Kanesh Sundrum